

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARL CORNELIOUS COTTON,

Defendant-Appellant.

UNPUBLISHED
September 11, 2014

No. 315717
Kent Circuit Court
LC No. 12-006545-FC

Before: SHAPIRO, P.J., and WHITBECK and STEPHENS, JJ.

PER CURIAM.

Defendant, Karl Cornelious Cotton, appeals as of right his conviction, following a jury trial, of first-degree murder.¹ We affirm.

I. FACTS

A. TRIAL TESTIMONY

A jury found Cotton guilty of killing Jamie Powell on March 5, 2011. Powell lived with Louis Chevis, her boyfriend, who is the brother of Ante Webb. Webb testified that, on March 5, 2011, Webb arranged for Cotton to purchase 6 to 10 pounds of marijuana for a “couple thousand” dollars. Webb did not intend to provide Cotton with marijuana; rather, he intended to rob Cotton of the money.

James Coleman testified that he drove Cotton from Benton Harbor to Grand Rapids. Coleman testified that Cotton and Webb agreed to meet at a gas station. According to Webb, he gave Coleman directions to Powell’s apartment complex. Webb intended to take Cotton’s money, enter the apartment complex through the back, exit through the front, and drive away with his ex-wife Pamela Matthews.

Webb testified that Cotton gave Webb some of the money in the parking lot and he told Cotton that he needed to go inside to retrieve the marijuana. Webb believed that Cotton grabbed

¹ MCL 750.316.

a gun, although Webb did not actually see Cotton possess a gun. Coleman testified that Cotton waited outside smoking while Webb went into the apartment complex. According to Coleman, at some point, Cotton went into the apartment complex.

According to Webb, he went to Powell's apartment and Powell let him in. Chevis was not at home. Webb told Powell that he was "in a bad position." Webb received two telephone calls from Cotton while he was inside Powell's apartment, including one call at 12:51 p.m. Webb heard footsteps in the hallway and he told Powell that he needed to leave. Webb left Powell's apartment through the bedroom window.

Ricardo Leal, a records custodian for Sprint/Nextel, testified that Cotton's telephone number showed an outbound call to Webb's telephone number at 12:51 p.m. Erik Boillat, an expert in cellular telephone analysis, testified that at 12:51 p.m. both phones were accessing the same cell tower, which meant that Webb and Cotton were in close proximity with each other. Brodey Hill, an information technologist, testified on cross-examination that Cotton received a call at 1:27 p.m. and that the cell tower records indicated that Cotton was 26.8 miles away from Powell's apartment.

According to George Schwab, a neighbor who lived in a third-floor apartment, at about 12:45 p.m. he saw Webb jump out of a second-story window into the parking lot. Schwab thought that the behavior was odd, so he wrote down the license plate number of the car that Webb entered. Webb testified that Matthews was waiting outside, and Webb left with Matthews. Schwab testified that he went inside his apartment to check his emails for about 30 minutes, and then he heard gunshots. About 30 minutes after the gunshots, Schwab went out onto his balcony, noticed that the window of Powell's apartment was still open, and called the police.

Richard McDowell, who lived across the hall from Powell's apartment, testified that gunshots woke him at some point between 12:40 and 1:30 p.m. McDowell testified that he felt dazed and confused, convinced himself that the sound had not been gunshots, and did not call anyone. He testified that police arrived about 30 minutes later. Officer Scott Malkewitz testified that he found Powell's body.

Coleman testified that Cotton returned to his vehicle at some point and seemed angry and upset. According to Coleman, Cotton said that he could not "believe they got him." Cotton thought that a white female who was Webb's girlfriend had arranged the robbery. Coleman drove Cotton home.

B. THE AUDIO RECORDING

Derrick McGehee testified that he and Cotton shared a housing unit in jail, where they each had their own cell. According to McGehee, he and Cotton were both from Benton Harbor and they became friends and talked about their cases. Cotton told him that he was involved in a drug deal in Grand Rapids, that someone was robbed, and that a woman named Jamie was shot and killed. McGehee testified that Cotton did not specifically state why Powell was shot, but said that "he was just angry, that, you know, she deserved it, and . . . if anybody had any family that nobody was safe, you know, if they'd done something to him."

According to McGehee, he was concerned that Cotton felt no remorse over Powell's death. He agreed to record a conversation with Cotton for Detective Brandyn Heugel. On March 23, 2012, McGehee asked Cotton why he killed Powell and whether he felt guilty. The recording was played for the jury. McGehee testified that he was sure he was speaking with Cotton on the recording.

Bob Durham testified that he was in the same housing unit as Cotton in jail. Durham testified that he spoke with Cotton at around 10:30 p.m. on July 22, 2012, and that he knew it was Cotton because he recognized Cotton's voice. According to Durham, Cotton claimed to have given the female victim in his case "education not [to] f*** anybody over again."

C. THE VOICE IDENTIFICATION EXPERT

On October 22, 2012, Cotton's counsel petitioned the trial court to authorize him to seek an expert in voice identification analysis. The trial court authorized \$1,000 for Cotton to seek an expert and adjourned trial until January 7, 2013.

On December 28, 2012, Cotton's counsel sent the prosecutor an email providing the "CV for my audio expert who is reviewing" McGehee's recording. On December 31, 2012, the prosecutor filed a motion in limine, seeking to exclude the expert's testimony because the prosecutor had not timely received notice of the expert. The prosecutor also contended that the expert's testimony would be inadmissible at trial. Cotton's counsel responded that it had been "challenging" to find an expert to review Cotton's case.

On Friday, January 4, 2013, the trial court heard the prosecutor's motion. The prosecutor contended that she had not received Cotton's expert's report until that morning and that the expert's proposed testimony was inadmissible. Cotton's counsel moved to adjourn the trial. The trial court excluded the expert's proposed testimony.

The trial court reasoned that trial was set for Monday, that numerous witnesses were subpoenaed, some of them from out of state. The trial court determined that Cotton's counsel had not complied with the discovery rule regarding expert testimony and that counsel's tardiness placed the prosecutor at a disadvantage. The trial court noted that the prosecutor would not be able to find a rebuttal expert by Monday. It found that trial would not be easy to adjourn. Finally, the trial court reasoned that voice print identification analysis was inadmissible unless the trial court held a *Daubert*² hearing, and that it would not be able to hold such a hearing by Monday. Accordingly, the trial court excluded the expert's testimony and denied Cotton's motion for an adjournment. During an offer of proof, counsel indicated that the expert would have testified that he was 90% certain that the voice in the recording was not Cotton's.

² *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 589; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

II. EXCLUDED EXPERT TESTIMONY

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

This Court reviews for an abuse of discretion the trial court's decision to permit or deny the late endorsement of an expert witness.³ The trial court abuses its discretion when its decision falls outside the range of principled outcomes.⁴ A preserved error is the exclusion of evidence is grounds for reversal only if it affirmatively appears that it is "more probable than not that the error was outcome determinative."⁵

Generally, we review de novo whether the defendant was deprived of his constitutional right to present a defense.⁶ However, because Cotton did not raise this specific issue before the trial court, this issue is unpreserved.⁷ We review unpreserved issues for plain error affecting the defendant's substantial rights.⁸ An error is plain if it is clear or obvious.⁹ An error affected the defendant's substantial rights if it affected the outcome of the lower court proceedings.¹⁰

B. LEGAL STANDARDS

MCR 6.201(A)(1) provides that a party shall provide "the names and addresses off all lay and expert witnesses" and must make the witnesses available for the other party to interview. This rule also provides "the witness list may be amended without leave of the court no later than 28 days before trial."¹¹ MCR 6.201(A)(3) provides that a party must provide "the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony . . ." if the other party so requests. The party must comply with the opposing party's request within 21 days.¹²

"A defendant has a constitutionally guaranteed right to present a defense, which includes the right to call witnesses."¹³ However, this right is not absolute.¹⁴ The defendant must comply

³ *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

⁴ *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

⁵ *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). See also *People v Blackmon*, 280 Mich App 253, 260; 761 NW2d 172 (2008) (evidentiary error is non-constitutional error).

⁶ *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009).

⁷ See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

⁸ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999)

⁹ *Id.* at 764.

¹⁰ *Id.*

¹¹ MCR 6.201(A)(1).

¹² MCR 6.201(F).

¹³ *Yost*, 278 Mich App at 379.

with procedural and evidentiary rules when presenting his or her defense.¹⁵ Further, the defendant's right to present a defense is not violated when, despite the exclusion of evidence, the defendant is able to present his or her theory of the case to the jury.¹⁶

C. APPLYING THE STANDARDS

Cotton contends that the trial court abused its discretion when it excluded the testimony of his expert witness, which in turn deprived him of his right to present a defense. We disagree.

Here, the trial court found that Cotton could not comply with the prosecutor's July 20, 2012 discovery request because the court did not approve funds for Cotton's expert until October 22, 2012. However, the trial court also found that Cotton had unreasonably delayed disclosing the expert witness by waiting from October 22 to December 28, shortly before the scheduled trial, to inform the prosecutor about his expert witness. The trial court found that the delay unfairly prejudiced the prosecutor because she would not be able to obtain a rebuttal witness.

We conclude that the trial court did not abuse its discretion when it excluded the testimony of Cotton's proposed expert witness. Cotton waited until very shortly before trial to disclose the existence of the expert witness, and did not disclose the expert's report until the Friday before the Monday trial date. Under these circumstances, the trial court's decision to exclude the proposed expert witness did not fall outside the range of principled outcomes.

Further, we conclude that the trial court's decision to exclude the evidence did not deprive Cotton of a substantial defense. Cotton failed to comply with the discovery rules designed to ensure a fair trial. And Cotton was able to argue that the voice on the recording was not his and that McGehee and Durham had reasoned to fabricate their stories about the recording and Cotton's statements. Because Cotton was able to do so, the trial court's decision did not deny him his right to confront the witnesses or present a defense.

III. ADJOURNMENT

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision to deny a motion for adjournment.¹⁷ The trial court abuses its discretion when its decision falls outside the range of principled outcomes.¹⁸

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *People v Herndon*, 246 Mich App 371, 411; 633 NW2d 376 (2001),

¹⁷ *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003).

¹⁸ *Reese*, 491 Mich at 139.

B. LEGAL STANDARDS

MCR 2.503(C) provides that a party may move to adjourn a trial on the basis of unavailable evidence. “A motion for adjournment must be based on good cause.”¹⁹ To determine whether a defendant’s motion is based on good cause, the trial court must ascertain

whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.

C. APPLYING THE STANDARDS

Cotton contends that the trial court abused its discretion when it denied his motion for an adjournment. We disagree.

Cotton did not move for an adjournment until January 4, 2013. Trial was scheduled to begin January 7, 2013. The trial court also found that Cotton had requested one previous adjournment. It found that granting Cotton’s request for an adjournment would unreasonably burden the witnesses and the victim’s family. And, as noted above, the trial court found that Cotton did not have good cause for an adjournment, and that his delayed disclosure was unreasonable. Under these circumstances, we conclude that the trial court’s decision to deny Cotton’s request for an adjournment did not fall outside the range of principled outcomes.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

A defendant must move the trial court for a new trial or evidentiary hearing to preserve the defendant’s claim that his counsel was ineffective.²⁰ When the trial court has not conducted a hearing to determine whether a defendant’s counsel was ineffective, our review is limited to mistakes apparent from the record.²¹

B. LEGAL STANDARDS

A criminal defendant has the fundamental right to effective assistance of counsel.²² To prove that his defense counsel was not effective, the defendant must show that (1) defense

¹⁹ *Coy*, 258 Mich App at 18.

²⁰ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Unger (On Remand)*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

²¹ *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012).

²² US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant.²³ We must presume that counsel provided effective assistance,²⁴ and we must consider the possible reasons for counsel's actions.²⁵ A defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different.²⁶

C. DISCOVERY ORDER

Cotton contends that counsel was ineffective for failing to timely comply with the trial court's discovery order. Cotton argues that counsel's action deprived him of the rights to present a defense and confront the witnesses against him. We disagree.

On the record before us, we are not convinced that counsel's inability to obtain an expert fell below an objective standard of reasonableness. Here, counsel indicated that finding an expert to review the voice recording was "challenging." While counsel did not present the expert's name to the prosecutor until December 28, 2012, there is no evidence in the record that counsel unreasonably delayed *attempting* to procure the expert. There is also no evidence that counsel unreasonably delayed in disclosing the expert or producing the expert's report once he procured an expert. To the contrary, in counsel's December 28, 2012 email to the prosecutor, counsel used the present tense when stating that the expert was reviewing the recording. This indicates that the expert had not yet finished his review and had not given defense counsel the report. We conclude that Cotton has not shown that defense counsel's actions fell below an objective standard of reasonableness.

Further, there is no indication that, had counsel acted differently, the result of the proceeding would have been different. As noted above, a defendant is not deprived of a substantial defense if, despite the exclusion of evidence, the defendant is able to present his or her theory of the case to the jury.²⁷ Here, Cotton was able to present his theory that McGehee and Durham fabricated the recording to the jury. And Cotton had the ability to cross-examine McGehee and Durham on their testimony and statements. We conclude that Cotton has not shown that counsel's actions prejudiced him.

²³ *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

²⁴ *Unger*, 278 Mich App at 242.

²⁵ *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012); *Cullen v Pinholster*, 563 US ___, ___; 131 S Ct 1388, 1407; 179 L Ed 2d 557, 578 (2011).

²⁶ *Pickens*, 446 Mich at 312.

²⁷ *Herndon*, 246 Mich App at 411.

D. ADDITIONAL ISSUES OF INEFFECTIVE ASSISTANCE

In his brief filed pursuant to Michigan Supreme Court Administrative Order No. 2004-6, Standard 4, Cotton raises separate issues regarding the effectiveness of counsel's assistance.

1. HANDWRITING EXPERT

Cotton contends that counsel was ineffective when he sought to obtain a handwriting expert, but instead obtained a voice expert. We conclude that Cotton's issue lacks merit. The prosecutor did not admit any handwritten evidence in Cotton's case. Accordingly, counsel's decision not to obtain a handwriting expert was neither unreasonable nor prejudicial.

2. ALIBI DEFENSE

Cotton asserts that counsel was ineffective when he failed to present an alibi defense and failed to present exculpatory phone records to the jury. We conclude that the record does not support Cotton's assertion. Counsel heavily relied on the phone records to contend that Cotton was not in Powell's apartment when the shooting took place. Accordingly, counsel *did* present an alibi defense based on the exculpatory phone records.

3. IMPEACHMENT EVIDENCE

Cotton contends that counsel was ineffective when he failed to impeach Detective Huegel and Webb with prior inconsistent statements in which they stated that Cotton actually had a firearm. We conclude that counsel's strategy was not unreasonable.

There are times when it is better for counsel not to draw attention to a witness's testimony.²⁸ Cotton does not explain why reasonable counsel would want to illicit evidence from the witnesses that Cotton did, in fact, have a firearm. Further, counsel impeached Webb with other evidence and attempted to place his credibility in doubt with the jury. We conclude that counsel did not unreasonably fail to impeach Heugel's and Webb's statements that Cotton did not have a gun with evidence that they had previously testified that he did have a gun.

V. COTTON'S ADDITIONAL ISSUES

Cotton raises two additional issues in his Standard 4 brief.

A. PROSECUTORIAL MISCONDUCT

1. STANDARD OF REVIEW

This Court will not reverse a conviction on the basis of prosecutorial misconduct when the defendant did not "timely and specifically" challenge the alleged misconduct before the trial

²⁸ See *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212 (2008).

court, unless a failure to review the issue would result in the miscarriage of justice.²⁹ We review unpreserved claims of prosecutorial misconduct for plain error.³⁰

2. LEGAL STANDARDS

A prosecutor can deny a defendant's right to a fair trial by making improper remarks that infringe on a defendant's constitutional rights or by making remarks that "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process."³¹ The prosecutor commits misconduct if the prosecutor abandoned his or her responsibility to seek justice and, in doing so, denies the defendant a fair and impartial trial.³²

3. APPLYING THE STANDARDS

Cotton contends that the prosecutor argued facts not in evidence when the prosecutor (1) argued that Cotton said that the victim "got what she deserved" when there was no evidence that he said that, (2) claimed that Cotton calmly left Powell's apartment, and (3) suggested that Webb saw Cotton with a gun. We concluded that none of these incidents constitutes prosecutorial misconduct.

A prosecutor may not argue the effect of testimony that was not in evidence.³³ However, a prosecutor may argue all the facts in evidence and all reasonable inferences arising from them as they relate to the prosecutor's theory of the case.³⁴

The prosecutor attributed the statement that the victim "got what she deserved" on the audio recording to Cotton. Here, McGehee testified that he was sure that the other voice in the recording was Cotton's. Accordingly, the prosecutor's argument reasonably inferred that Cotton made the statements on the recording. We conclude that the prosecutor's statement did not constitute misconduct.

The prosecutor also asked the jury to consider whether a person who had committed murder would make a commotion or would calmly leave the crime scene, and then stated that Cotton had calmly walked to his car, said that he could not believe that they got him, and left. Here, none of the witnesses testified that they heard any commotion other than the gunshots. Coleman testified that Cotton went into the apartment building, came out at some point later, said that they "got him," and then he and Cotton left. Given Coleman's testimony, we conclude

²⁹ *Unger*, 278 Mich App at 234-235.

³⁰ *Id.* at 235; *Carines*, 460 Mich at 764.

³¹ *Donnelly v DeChristoforo*, 416 US 637, 643; 94 S Ct 1868 (1974). See *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

³² *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

³³ *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

³⁴ *Bahoda*, 448 Mich at 282; *Unger*, 278 Mich App at 236.

that the prosecutor's argument was related to the prosecutor's theory of the case and within the range of inferences arising from the evidence.

Finally, when discussing Webb's state of mind, the prosecutor argues, that Webb "thinks they have a gun out in the hallway[.]" Webb testified that he thought Cotton had grabbed a gun, but that he did not see Cotton actually possess the gun. Webb also testified that he told Powell that he needed to leave when he heard footsteps in the hallway. We conclude that the prosecutor's argument that Webb thought that Cotton had a gun did not mischaracterize Webb's testimony. Contrary to Cotton's assertion on appeal, the prosecutor did not state that Webb saw Cotton with a gun.

B. ADMISSION OF THE AUDIO CONVERSATION

1. STANDARD OF REVIEW

This Court reviews for an abuse of discretion preserved challenges to the trial court's evidentiary rulings.³⁵ We review *de novo* preliminary questions of law surrounding the admission of evidence, such as whether a rule of evidence bars admitting it.³⁶

2. LEGAL STANDARDS

MRE 901 provides that a proponent of evidence must provide "evidence sufficient to support a finding that the matter in question is what the proponent claims." "[A]udio ordinarily may be authenticated by having a knowledgeable witness identify the voices on the table."³⁷

3. APPLYING THE STANDARDS

Cotton contends that the trial court improperly admitted the audio recording because there was no evidence that the voice on the recording was Cotton's. We disagree.

Here, McGehee testified that the voices on the recording were his own and Cotton's. McGehee was present when the recording was made. Thus, the prosecutor laid a proper foundation to admit the audio. Whether McGehee *correctly* identified Cotton's voice was a proper topic for cross-examination. When counsel asked McGehee if he was sure that the voice was Cotton's, McGehee said that he was sure.

Cotton also contends that the evidence was more prejudicial than probative under MRE 403 because Cotton did not testify and could not be impeached.

"Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury."³⁸ Evidence of a defendant's

³⁵ *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

³⁶ *Id.* at 761.

³⁷ *People v Berkey*, 437 Mich 40, 48; 467 NW2d 6 (1991).

motive is relevant.³⁹ Here, the prosecutor did not offer the statement as a prior, inconsistent statement. Rather, the prosecutor offered the statement as direct evidence of Cotton's motive to kill Powell. Accordingly, the evidence was relevant and it was not marginally probative. Further, there is no indication that the evidence injected extraneous considerations into the case.⁴⁰ We conclude that the trial court did not abuse its discretion by admitting the recording of Cotton's conversation with McGehee.

VI. CONCLUSION

We conclude that the trial court did not abuse its discretion by admitting the audio recording of the conversation between Cotton and McGehee, by denying Cotton's motion for an adjournment, or by excluding Cotton's proposed expert testimony on voice analysis. We also conclude that Cotton has not shown that trial counsel provided ineffective assistance. We further conclude that Cotton has not established that prosecutorial misconduct denied him his right to a fair trial.

We affirm.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Cynthia Diane Stephens

³⁸ *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

³⁹ *Herndon*, 246 Mich App at 412-413.

⁴⁰ See *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984).